



4510-29-P

**DEPARTMENT OF LABOR**

Employee Benefits Security Administration

Proposed Exemptions from Certain Prohibited Transaction  
Restrictions

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Notice of Proposed Exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following proposed exemptions: **D-11770, Teamsters Union Local No. 727 Pension Fund; L-11794, Local 268, Sheet Metal Workers International Association, AFL-CIO; and D-11821, EXCO Resources, Inc. 401(k) Plan.**

**DATES:** All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this Federal Register Notice.

**ADDRESSES:** Comments and requests for a hearing should state:

(1) the name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N-5700, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. \_\_\_\_\_, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: [moффitt.betty@dol.gov](mailto:moффitt.betty@dol.gov), or by FAX to (202) 219-0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department

of Labor, Room N-1513, 200 Constitution Avenue, N.W.,  
Washington, D.C. 20210.

**WARNING:** All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

**SUPPLEMENTARY INFORMATION:**

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the Federal Register. Such notice shall include a copy of the notice of proposed exemption as published in the Federal Register and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set

forth in 29 CFR Part 2570, Subpart B (76 FR 66637, 66644,  
October 27,

2011).<sup>1</sup> Effective December 31, 1978, section 102 of  
Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996),  
transferred the authority of the Secretary of the Treasury to  
issue exemptions of the type requested to the Secretary of  
Labor. Therefore, these notices of proposed exemption are issued  
solely by the Department.

The applications contain representations with regard to the  
proposed exemptions which are summarized below. Interested  
persons are referred to the applications on file with the  
Department for a complete statement of the facts and  
representations.

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<sup>1</sup> The Department has considered exemption applications received  
prior to December 27, 2011 under the exemption procedures set  
forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August  
10, 1990).

**Teamsters Union Local No. 727 Pension Fund (the Fund)**

**Located in Chicago, Illinois**

**[Application No. D-11770]**

#### PROPOSED EXEMPTION

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).<sup>2</sup>

#### Section I. Covered Transactions

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A) and (D) of ERISA, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) and (D) of the Code, shall not apply to: (1) the sale (the Sale) by the Fund of three separate 25 percent interests in 1300 Higgins Road LLC (the LLC), a

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<sup>2</sup> For purposes of this proposed exemption, references to section 406 of ERISA should be read to refer to the corresponding provisions of section 4975 of the Code as well.

limited liability company of which the Fund is the sole member (each, an LLC Interest, and collectively, the LLC Interests), respectively, to each of Local 700, Teamsters Local Union No. 727 (Local 727), and the Teamsters Joint Council No. 25 (the Joint Council, and together with Local 700 and Local 727, the Unions); and (2) the subsequent Sale of the Fund's remaining 25 percent LLC interest (the Fund's LLC Interest) to the Unions due to exercise by the Fund of a put right to sell the Fund's LLC Interest to the Unions (the Put Right), provided that the conditions in Section II are satisfied.

## Section II. Conditions for Relief

(a) The Fund receives from each of the Unions, as consideration for the Sale of the LLC Interests, a cash amount equal to 25 percent of the greater of: (1) the original purchase price paid by the Fund, or (2) the fair market value of the O'Hare Corporate Center in Park Ridge, Illinois (the Property), determined on the date of the Sale by an Independent Appraiser;

(b) The Fund, upon exercise of the Put Right, receives from the Unions a one-time aggregate cash amount equal to 25 percent of the greater of: (1) the original purchase price paid by the Fund, or (2) the fair market value of the Property on the

date of exercise of the Put Right, as determined by an Independent Appraiser;

(c) The Sale and the exercise of the Put Right are each one-time transactions for cash;

(d) The Independent Fiduciary: (1) analyzes and approves the terms of the Sale and Put Right; (2) ensures that the terms of the Sale and Put Right and the conditions of the exemption are met; (3) has sole responsibility for the exercise of the Put Right on behalf of the Fund; (4) has sole responsibility and authority for the management and operation of the LLC and the Property; and (5) selects the Independent Appraiser and verifies the methodology used by the Independent Appraiser in determining the fair market value of the Property for all purposes under this proposed exemption;

(e) An Independent Appraiser, who is selected by the Independent Fiduciary, establishes the fair market value of the Property for purposes of the Sale and the Put Right, using a methodology approved by the Independent Fiduciary;

(f) The Fund does not pay any commissions, costs or other expenses in connection with the Sale and Put Right, other than the legal fees of the Fund's counsel, the services of the Independent Fiduciary and the services of the Independent

Appraiser;

(g) Since its acquisition of the Property, the Fund's ownership interest in the Property has constituted five percent or less of the Fund's assets, and immediately after the Sale the Fund's ownership interest in the Property will be less than two percent of the Fund's assets;

(h) No member of the LLC shall, directly or indirectly, without the approval of the Independent Fiduciary: (1) act for or on behalf of the LLC; (2) transact any business in the name of the LLC; or (3) sign documents for or otherwise bind the LLC;

(i) No LLC Interests shall be transferable by the Unions prior to the exercise of the Put Right by the Fund, without the approval of the Independent Fiduciary;

(j) Any trustee of the Fund must recuse himself or herself from any vote regarding the termination or removal of the Independent Fiduciary for the Fund if he or she is an officer (or a relative of an officer as defined in Section III) of any of the Unions;

(k) The terms and conditions of the Sale and the Put Right are at least as favorable to the Fund as those obtainable in an arm's-length transaction with an unrelated third party; and

(l) The Sale or Put Right is not part of an arrangement,



agreement, or understanding designed to benefit a party in interest with respect to the Fund.

### Section III. Definitions

(a) The term "relative" is a relative as that term is defined in section 3(15) of ERISA, and also includes a brother, sister, and a spouse of a brother or sister;

(b) The term "Independent Fiduciary" means Intercontinental Real Estate Corporation (Intercontinental) or another fiduciary of the Plan who (1) is independent or unrelated to the Unions and their affiliates and has the appropriate training, experience, and facilities to act on behalf of the Plan regarding the covered transactions in accordance with the fiduciary duties and responsibilities prescribed by ERISA (including, if necessary, the responsibility to seek the counsel of knowledgeable advisors to assist in its compliance with ERISA), and (2) if relevant, succeeds Intercontinental in its capacity as Fiduciary to the Plans in connection with the transactions described herein. The Independent Fiduciary will not be deemed to be independent of and unrelated to the Unions and their affiliates if: (i) Such

Independent Fiduciary directly or indirectly controls, is controlled by or is under common control, with the Unions and their affiliates; (ii) such Independent Fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this proposed exemption other than for acting as independent fiduciary in connection with the transactions described herein, provided that the amount or payment of such compensation is not contingent upon, or in any way affected by, the Independent Fiduciary's ultimate decision; and (iii) the annual gross revenue received by the Independent Fiduciary, during any year of its engagement, from the Unions and their affiliates, exceeds two percent (2%) of the Independent Fiduciary's annual gross revenue from all sources (for federal income tax purposes) for its prior tax year;

(c) The term "Independent Appraiser" means an individual or entity meeting the definition of a "Qualified Independent Appraiser" under 29 CFR 2570.31(i) retained to determine, on behalf of the Plans, the fair market value of the Property as of the date of the Sale, and may be the Independent Fiduciary, provided it satisfies the definition of Independent Appraiser herein;

(d) The term "affiliate" of a person includes:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with, the person;

(2) Any officer, director, employee, relative, or partner of the person; or

(3) Any corporation or partnership of which such person is an officer; and

(e) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

EFFECTIVE DATES: The proposed exemption, if granted, will be effective as of the date that a final notice of granted exemption is published in the Federal Register.

### SUMMARY OF FACTS AND REPRESENTATIONS<sup>3</sup>

#### *Background*

1. The Teamsters Union Local No. 727 Pension Fund (the

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<sup>3</sup> The Summary of Facts and Representations is based on the Applicant's representations and does not reflect the views of the Department, unless otherwise indicated.

Fund) is a defined benefit pension plan established under a Declaration of Trust between the International Brotherhood of Teamsters Union Local No. 727 (Local 727) and several contributing employers. The Fund is established and administered pursuant to the provisions of section 302(c)(5) of the Labor Management Relations Act of 1947.

The Fund is managed and administered by a Board of Trustees (the Trustees or the Applicant) that is comprised of four Trustees who are selected by employers who are parties to collective bargaining agreements with Local 727 and four Trustees who are selected by Local 727. The Applicant states that the Fund covers eligible members of Local 727 and certain employees of Local 727, Teamsters Local Union No. 700 (Local 700) and Teamsters Joint Council No. 25 (Joint Council) (collectively, the Unions). As of February 28, 2014, the Applicant notes, the Fund had total assets of approximately \$239,677,146 and net assets of \$238,141,734.<sup>4</sup>

2. According to the Applicant, on February 26, 2010, the Fund completed its purchase of a building and a parcel of

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<sup>4</sup> These amounts were reported on the Form 5500 for the Fund's plan year ending February 28, 2014.

improved real estate located at 1300 Higgins Road in Park Ridge, Illinois (the Property) from Duke Realty, an unaffiliated third party, for a purchase price of \$7,405,000.<sup>5</sup> The Applicant represents that the Property comprises approximately two acres and the building contains 95,600 square feet of net rentable area office space known as "the O'Hare Corporate Center."

3. The Applicant represents that the purchase of the Property was based on a written recommendation from Intercontinental Real Estate Corporation (Intercontinental), a real estate consulting company based in Boston, Massachusetts. The Applicant states that Intercontinental is an SEC-registered investment adviser with \$2.5 billion in assets under management, and that Intercontinental has developed, built, managed and owned \$6 billion of commercial real estate. The recommendation was included in an investment management agreement prepared by Intercontinental for the Fund (the Management Agreement), dated February 2, 2010. The Management Agreement included a financial and strategic analysis of the Property and noted that the Property was well-maintained and could accommodate both small

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<sup>5</sup> The current value of the Property, as reported in an appraisal performed by US Realty Consultants, Inc. on behalf of the Fund for Intercontinental, is \$9,100,000 as of May 30, 2013.

and mid-sized tenants, which make up the bulk of the demand in the O'Hare suburban submarket of Chicago where the Property is located. The Management Agreement also included a lease expiration schedule for the Property, a schedule of comparable sales and a schedule of comparable leases.

4. The Applicant states that, in connection with the Fund's purchase of the Property, Intercontinental formed the 1300 Higgins Road LLC (the LLC) to hold the Property after its purchase by the Fund. Accordingly, upon completing its purchase, the Fund transferred ownership of the Property to the LLC and the Fund became the LLC's sole member (an LLC Member).

5. The Applicant represents that Intercontinental has made leasing decisions on behalf of the LLC with respect to the Property since its acquisition. In its Management Agreement, Intercontinental concluded that leasing space to the Unions would, among other things, stabilize the building at the time of economic uncertainty.<sup>6</sup> Accordingly, the Applicant represents that on July 1, 2010, the Fund entered into a second investment

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<sup>6</sup> As of February 2, 2010, 76 percent of the net rentable area of the Property was leased.

management agreement with Intercontinental (the AMA), with respect to the leasing of the property.

6. According to the Applicant, Intercontinental executed leases with respect to the Property (the Leases) with: Local 700, effective May 1, 2010; Joint Council, effective April 1, 2010; and Local 727, effective May 1, 2011.<sup>7</sup> The Applicant represents that Intercontinental has had ongoing responsibilities with respect to the Property since February 2010 including executing the Leases and making subsequent decisions with respect to the Leases on behalf of the LLC.

#### *Request for Relief*

7. The Applicant represents that the Fund desires to sell a 25 percent interest in the LLC (an LLC Interest) to each of the Unions for an aggregate amount equal to 75 percent of the LLC in a one-time sale in exchange for cash (the Sale). The Applicant states that, in exchange for the LLC Interests, the

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<sup>7</sup> The Applicant represents that it entered into the Leases with the belief that exemptive relief for such transactions is provided by PTE 76-1, 41 FR 12740, March 25, 1976, as corrected at 41 FR 16620, April 20, 1976, and PTE 77-10, 42 FR 33918, July 1, 1977. The Department is not expressing a view herein whether the Applicant has complied with the conditions of such class exemptions.

Fund will receive an amount from each Union that is equal to 25 percent of the greater of: (1) the original purchase price paid by the Fund, or (2) the fair market value of the Property determined on the date of the Sale by an independent appraiser (Independent Appraiser). As discussed below, following any Sale, the Independent Fiduciary acting on behalf of the Fund will retain full and complete control over the management and operation of the LLC and the Property.

8. The Applicant represents that the Fund wishes to engage in the Sale because the Fund desires to increase the diversity of its investments by reducing its investment in the O'Hare Corporate Center. Furthermore, the Fund believes that the Sale will be in the interest of its participants and beneficiaries because the Unions, as tenants, would be more likely to continue their occupancy if they also owned an interest in the Property (thus increasing the likelihood of the long-term success of the Fund's investment in the Property), and will have a vested interest in preserving the value of the O'Hare Corporate Center.

9. The Applicant represents that Intercontinental will act as the independent fiduciary (Independent Fiduciary) with respect to the Sale and will manage the operation of the LLC on behalf of the Fund, pursuant to the Amended and Restated



Operating Agreement for the LLC (the Operating Agreement) following the Sale. The Applicant represents that no member of the LLC will, directly or indirectly, act for or on behalf of the LLC, transact any business in the name of the LLC or sign documents for or otherwise bind the LLC without the approval of the Independent Fiduciary. The Applicant represents that the Operating Agreement provides that the Independent Fiduciary will have the sole authority to cause or permit the LLC to take certain actions that generally include (but are not limited to) borrowing money or amending the terms and conditions of any financing, granting any security interest affecting the Property, selling any portion of the Property (including any other sale of the Property in connection with the enforcement of the Fund's rights under the Operating Agreement), entering into or amending any contract for the design, construction, management or leasing of the Property, making alterations to the Property, dissolving the LLC, and

entering into any merger, consolidation or restructuring of the LLC.

10. The Operating Agreement also provides the Fund with the right to require each of the Unions to purchase the Fund's remaining LLC Interest (the Put Right) for an aggregate cash purchase price equal to 25 percent of the greater of: (a) the price the Fund originally paid for the Property; or (b) the current fair market value of the Property. The Put Right will be exercisable at the sole election of the Independent Fiduciary upon delivery of notice of such election to each of the Unions. For purposes of determining the price of the Put Right, the Applicant represents that the Independent Fiduciary will retain an Independent Appraiser to value the Property within 10 days of delivering notice of election in order to prepare an appraisal report. In addition, the Applicant represents that the Independent Fiduciary will be responsible for ensuring that the methodology used by such independent appraiser is properly applied. The Applicant further represents that the exercise price of the Put Right will be determined without a minority ownership discount for any illiquidity of the Fund's LLC Interest. Pursuant to the terms of the Operating Agreement, the purchase of the Fund's LLC Interest by the Unions in connection

with the exercise of the Put Right will close on the later of:

(1) 30 business days after delivery of notice; or (2) five business days after the Independent Appraiser determines the fair market value of the Property. The Applicant represents that, prior to the exercise of the Put Right, the LLC Interests held by the Unions will not be transferable, without the approval of the Independent Fiduciary.

11. The Applicant states that the initial Sale and subsequent Sale upon exercise of the Put Right would violate sections 406(a)(1)(A) and 406(a)(1)(D) of ERISA. Section 406(a)(1)(A) of ERISA prohibits a fiduciary of a plan from causing the plan to engage in a transaction, if he or she knows or should know that such transaction constitutes the sale or exchange or leasing of property between the plan and a party in interest with respect to the plan. Section 406(a)(1)(D) of ERISA prohibits a fiduciary of a plan from causing the plan to engage in a transaction, if he or she knows or should know that such transaction constitutes a transfer of assets of the plan to a party in interest. According to the Applicant, the Sale of the LLC Interests to the Unions and the exercise of the Put Right by the Independent Fiduciary on behalf of the Fund whereby the Unions would purchase the Fund's LLC Interest, would

constitute violations of section 406(a)(1)(A) and (D) of ERISA, because the Unions are parties in interest with respect to the Fund under section 3(14)(D) of ERISA. Accordingly, the Applicant requests exemptive relief from sections 406(a)(1)(A) and 406(a)(1)(D) of ERISA for the initial Sale of the LLC Interests by the Fund to each of the Unions and for the subsequent Sale of the Fund's LLC Interest to the Unions upon the exercise of the Put Right.

#### *The Independent Fiduciary*

12. The Applicant represents that Intercontinental has been continuously involved in representing the Fund as its Independent Fiduciary in connection with the Property. In this regard, Intercontinental represents that it meets the Department's definition of a "qualified independent fiduciary" for purposes of the covered transactions.<sup>8</sup> Intercontinental explains that it has the training, experience, and facilities to act on behalf of the Fund regarding the Sale, the Put Right, and the management of the LLC and the Property. As described above, Intercontinental is a real estate consulting company and SEC-

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<sup>8</sup> See 29 CFR 2570.31(j).

registered investment adviser with \$2.5 billion in assets under management, that has developed, built, managed and owned approximately \$6 billion of commercial real estate. Intercontinental also represents that it is not an affiliate of, or related to, the entities involved in the covered transactions, and that it has received during each federal tax year of Intercontinental's engagement with respect to the covered transactions less than 2 percent of Intercontinental's annual revenue, based on the prior tax year, from the parties in interest and their affiliates. Intercontinental represents that, with respect to the covered transactions, it acts solely for the Fund and the Fund pays Intercontinental's fees.

13. Intercontinental also represents that it understands it is required, as the Independent Fiduciary, to conform its conduct to the duties and responsibilities of a fiduciary under ERISA, and understands the liabilities imposed under ERISA for its failure to do so. Intercontinental represents that it will engage the law firms of Mayer Brown LLP and Bradley & Associates to provide advice during the course of the covered transactions.

14. The Applicant represents that Intercontinental will analyze and approve the terms of the Sale and Put Right; monitor and ensure that the terms of such covered transactions and the

conditions of the exemption have been met; have the responsibility for the exercise of the Put Right on behalf of the Fund, in its sole discretion; and manage the operation of the LLC and the Property. Furthermore, the Applicant notes, Intercontinental will select the Independent Appraiser, and will verify the methodology used by the Independent Appraiser in establishing the fair market value of the Property.

#### *The Independent Appraiser*

15. Intercontinental represents that it retained US Realty Consultants, Inc. (US Realty) to serve as the Independent Appraiser and to prepare a qualified appraisal report for use in determining the fair market value of the Property for all purposes of the Sale and Put Right. The Applicant represents that Intercontinental will ensure that the methodology used by the Independent Appraiser is properly applied in determining the fair market value of the Property.

16. The Applicant represents that US Realty satisfies the Department's definition of a "qualified independent appraiser" for purposes of the covered transactions.<sup>9</sup> US Realty represents

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<sup>9</sup> See 29 CFR 2570.31(i).

that it had no prior relationship with the Unions or the Fund. Furthermore, US Realty states that its fee of \$5,250, as paid by the LLC, represents 1.4% of the gross billings of the Chicago office, which is responsible for performing the appraisal of the Property.

US Realty represents that Michael Maslanka and Noah McCloskey conducted the valuation of the Property. US Realty represents that Mr. Maslanka, Director for the Central Region, has 35 years of experience in real estate analysis, and has valued billions of dollars of real property, including commercial, residential, and special purpose properties such as theaters and railroad property. US Realty represents that Mr. Maslanka is a General Real Estate Appraiser certified in Illinois, Michigan, and Indiana and holds a "Member of Appraisal Institute" designation. US Realty represents that Mr. McCloskey has valued several billions of dollars of real property, including office, retail and industrial properties. US Realty represents that Mr. McCloskey is a General Real Estate Appraiser certified in Illinois, Indiana, Michigan, and Colorado.

17. In its appraisal report (the Appraisal), US Realty concluded that the market value of the Property, as of May 30, 2013, is \$9,100,000. US Realty employed an income

capitalization approach and a sales comparison approach to derive this market value. Both income and expense estimates were based upon an analysis of historic data provided from the subject in addition to data from comparable office properties. As detailed in the Appraisal, the discount rate and capitalization rate for the Property were within the range of the investment criteria of investors as well as comparable sales. These rates best emulate investor decision-making in analyzing factors such as the present value of the anticipated lease-up of vacant space, the implicit present value of above-market contract rent, the Property's tenant rollover profile, and other factors affecting the income stream over a period of time. The sales comparisons approach reflects the value of the Property based on an analysis of recent sales of similarly improved properties. Because the Property represents an investment capable of attracting investment capital, US Realty relied primarily on the value produced by the income capitalization approach, with the sales comparison approach providing additional support for the conclusion.

18. According to the Applicant, as of February 28, 2014, the Fund's interest in the LLC represented approximately 3.7 percent of the total Fund assets. After the Sale, the Fund's



remaining interest in the LLC would represent approximately 0.9 percent of the Fund's total assets.<sup>10</sup>

### *Statutory Findings*

19. The Applicant represents that the proposed exemption for the Sale would be administratively feasible because it is a one-time transaction for cash. Furthermore, the Applicant represents that an Independent Fiduciary will act on behalf of the Fund in connection with the approval of the Sale, the exercise of the Put Right, and the management of the LLC and the Property, thereby mitigating potential conflicts of interest and obviating the need for continued Departmental oversight.

20. The Applicant represents that the proposed exemption for the Sale is in the interest of the Fund and its participants and beneficiaries because the Sale will allow the Fund to diversify its investments by reducing its ownership stake in the LLC. Furthermore, the Applicant represents that the Unions, as owners of an interest in the Property, would be more likely to maintain their Leases, thus increasing the likelihood of long-

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<sup>10</sup> The calculations are based on the information reported on the Form 5500 for the plan year ending February 28, 2014.

term success of the Fund's investment in the Property. Also, due to the solvency of the Unions, the Applicant represents that the Fund has substantial assurance that the parties involved will be suitable company-owners with a vested interest in preserving the Property's value. Finally, the Applicant states that the Fund will not be responsible for paying any commissions, costs or other expenses in connection with the Sale, or the exercise of the Put Right, other than the legal fees of the Fund's counsel, the services of the Independent Fiduciary and the services of the Independent Appraiser.

21. The Applicant represents that the proposed exemption for the Sale is protective of the rights of Fund participants and beneficiaries, because the conditions for the exemption require that Intercontinental, as the Independent Fiduciary for the Fund, will have the sole discretion to determine whether the Fund proceeds with the Sale and whether the Fund will exercise the Put Right. In such event, the Fund will receive the fair market value for its LLC Interest, determined by the Independent Appraiser in an appraisal and verified by the Independent Fiduciary.

The Applicant states that the Independent Fiduciary will act as the manager of the LLC with the sole authority to manage

its affairs, and will retain full and complete control over the management and operation of the Property. In this regard, the Applicant represents that no member of the LLC will, directly or indirectly, without the approval of the Independent Fiduciary: (1) act for or on behalf of the LLC; (2) transact any business in the name of the LLC; or (3) sign documents for or otherwise bind the LLC. The Applicant represents that, prior to the exercise of the Put Right, the Unions must seek approval from the Independent Fiduciary prior to transferring the LLC Interests. The Applicant represents further that the Independent Fiduciary will enforce compliance with all conditions and obligations imposed on any party dealing with the Fund, ensure that the conditions of the proposed exemption, if granted, are met, and will ensure that the covered transactions remain in the interest of the Fund. Moreover, any Trustee of the Fund must recuse himself or herself from any vote regarding the termination or removal of the Independent Fiduciary for the Fund if he or she is an officer (or a relative of an officer) of any of the Unions.

Finally, since its acquisition of the Property, the Applicant notes, the Fund's ownership interest in the Property has constituted five percent or less of the Fund's assets, and

immediately after the Sale the Fund's ownership interest in the Property will be less than two percent of the Fund's assets.

#### *Summary*

22. In summary, the Applicant represents that the proposed exemption, if granted, satisfies the statutory criteria of section 408(a) of ERISA, for the reasons described above, including the following:

(a) The Fund will receive from each of the Unions as consideration for the Sale of the LLC Interests, a cash amount equal to 25 percent of the greater of: (1) the original purchase price paid by the Fund, or (2) the fair market value of the O'Hare Corporate Center in Park Ridge, Illinois (the Property), determined on the date of the Sale by an Independent Appraiser;

(b) The Fund, upon exercise of the Put Right, will receive from the Unions a one-time aggregate cash amount equal to 25 percent of the greater of: (1) the original purchase price paid by the Fund, or (2) the fair market value of the Property on the date of exercise of the Put Right, as determined by an Independent Appraiser;

(c) The Sale and the exercise of the Put Right will each be one-time transactions for cash;

(d) The Independent Fiduciary will: (1) analyze and approve the terms of the Sale and Put Right; (2) ensure that the terms of the Sale and Put Right and the conditions of the exemption are met; (3) have sole responsibility for the exercise of the Put Right on behalf of the Fund; (4) have sole responsibility and authority for the management and the operation of the LLC and the Property; and (5) select the Independent Appraiser and verify the methodology used by the Independent Appraiser in determining the fair market value of the Property for all purposes under this proposed exemption;

(e) An Independent Appraiser, who is selected by the Independent Fiduciary, will establish the fair market value of the Property for purposes of the Sale and the Put Right, using a methodology approved by the Independent Fiduciary;

(f) The Fund will not pay any commissions, costs or other expenses in connection with the Sale and Put Right, other than the legal fees of the Fund's counsel, the services of the Independent Fiduciary and the services of the Independent Appraiser;

(g) Since its acquisition of the Property, the Fund's ownership interest in the Property has constituted five percent or less of the Fund's assets, and immediately after the Sale the

Fund's ownership interest in the Property will be less than two percent of the Fund's assets;

(h) No member of the LLC will, directly or indirectly, without the approval of the Independent Fiduciary: (1) act for or on behalf of the LLC; (2) transact any business in the name of the LLC; or (3) sign documents for or otherwise bind the LLC; and

(i) No LLC Interests will be transferable by the Unions prior to the exercise of the Put Right by the Fund, without the approval of the Independent Fiduciary.

#### NOTICE TO INTERESTED PERSONS

Notice of the proposed exemption will be provided to all interested persons within 15 days of the publication of the notice of proposed exemption in the Federal Register, by first class U.S. mail to the last known address of all such Participants. Such notice will contain a copy of the notice of proposed exemption, as published in the Federal Register, and a supplemental statement, as required pursuant to 29 CFR

2570.43(b)(2).**11** The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the pending exemption. Written comments and hearing requests are due within 45 days of the publication of the notice of proposed exemption in the Federal Register. All comments will be made available to the public.

**WARNING:** Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Scott Ness of the Department, telephone (202) 693-8561. (This is not a toll-free number.)

**Local 268, Sheet Metal Workers International Association, AFL-CIO (the Union)**

**Located in Caseyville, IL**

**[Application No. L-11794]**

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**11** The Department considers exemption applications filed prior to December 27, 2011 under the Prohibited Transaction Procedures regulation set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

## PROPOSED EXEMPTION

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, 66644, October 27, 2011). If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of the Act, shall not apply to the sale by the Fund of certain improved real property located at 2727 N. 89<sup>th</sup> Street, Caseyville, IL 62232 (the Building), to the Union (the Sale), provided that the following conditions have been met:

(a) The Sale is a one-time transaction for cash;

(b) At the time of the Sale, the Fund receives the greater of either: (1) \$110,226.48; or (2) the fair market value of the Building, as established by a qualified independent appraiser (the Appraiser), as described in condition (c), as of the date of Sale;

(c) Before the date of Sale, an Appraiser who satisfies the Department's definition of "qualified independent appraiser" will be retained by the Independent Fiduciary on behalf of the



Fund without any involvement of the Union or any other party to the covered transactions or any planned future transactions, and will conduct a full, independent Appraisal (the Appraisal) of the Building for purposes of the Sale that complies in all respects with applicable appraisal standards;

(d) A qualified independent fiduciary (the Independent Fiduciary), acting on behalf of the Fund, represents the Fund's interests for all purposes with respect to the Sale, and: (1) determines, among other things, that it is in the best interest of the Fund to proceed with the Sale; and (2) reviews and approves the purchase price and methodology used by the Appraiser in its Appraisal;

(e) The Fund pays no fees, commissions or other expenses associated with the Sale; and

(f) The terms and conditions of the Sale are at least as favorable to the Fund as those obtainable in an arm's-length transaction with an unrelated third party.

## SUMMARY OF FACTS AND REPRESENTATIONS

### *Background*

1. Local 268, Sheet Metal Workers International Association, AFL-CIO (the Applicant or the Union) serves the Southern third of the State of Illinois. The Union was formed as an amalgamation of five smaller local unions on May 18, 1939. It is a local chapter of the Sheet Metal Workers International Association, an organization representing workers in the United States, Canada, and Puerto Rico, who work in the construction, manufacturing, service, railroad and shipyard industries.

2. The Local 268 Joint Apprenticeship and Training Fund (the Fund) is a jointly administered apprenticeship and training fund established under Section 302(c)(5) of the Taft Hartley Act by the Union and the Southern Illinois Chapter, Sheet Metal Contractors National Association (Association). The Fund was established for the purpose of supporting a program for the training and education of sheet metal apprentices, journeymen and other individuals designated by the Fund trustees (the Trustees). The Fund is used to defray the reasonable expenses of the apprenticeship and training programs, including the costs of the establishment and maintenance of apprenticeship and training programs, employment of sufficient personnel, and administration of salaries, supplies, facilities (including the leasing or

acquisition of real property and improvements thereon), tools, equipment, textbooks, and other instructional materials.

3. The Applicant represents that the current Trustees include employer-appointed Trustees, who are unaffiliated with the Union, and Union Trustees. The paid staff of the Fund includes the Fund coordinator (the Fund Coordinator), who is employed full time by the Fund, and two part-time instructors, who also work as hourly paid sheet metal workers and are employed by contributing employers. The Fund Coordinator and these instructors are not Trustees.**12**

4. The Applicant represents that the Fund's offices are located in the current union hall (the Union Hall), located at 2701 N. 89<sup>th</sup> Street, Caseyville, Illinois, 62232 (Building U).

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**12** The Applicant states that the Fund Coordinator's duties include serving as an instructor for Fund participants and that he receives no additional compensation when he is instructing. Furthermore, the Applicant represents that the part-time instructors do not work for contributing employers at the same time that they are teaching classes for the Fund. The Applicant represents that it is relying on section 408(b)(2) of the Act in connection with the provision of services by employees of contributing employers to the Fund, and the payment by the Fund of compensation for such services. The Department is not expressing a view herein as to whether the Fund has satisfied the conditions of section 408(b)(2) of the Act with respect to the provision of services by such employees to the Fund and the payment of compensation by the Fund in connection with such services.

The Applicant represents that the Union purchased Building U in 1984. In addition to the office space, beginning in 1986, the Fund maintained classrooms and a shop that were also located in Building U. Under its current leasing arrangement with the Union (the Old Lease), the Fund uses 3,800 square feet of Building U and pays rent of \$312 per month to the Union.

5. The Applicant represents that the Trustees expect to expand the Fund's training program to include service work, a computer lab for computer training, a larger welding lab, and additional equipment for training such as a press brake. In connection therewith, the training program staff has recently increased from two to three employees. The Applicant represents that the Trustees' plan for the Fund to increase training programs requires greater space than the current space being leased by the Fund from the Union in Building U.

#### *The Sale*

6. The Applicant represents that in 2010, the Fund purchased the building and real property located at 2727 N. 89<sup>th</sup> Street (Building A), from an unrelated third party at a price of \$65,000.00. The Applicant represents that Building A was purchased as a possible future site for the expansion of the

Fund's training program. The Applicant represents further that Building A was originally constructed as a three bedroom residential home, but it was converted to commercial and industrial use, and has 1776 square feet. The Applicant states that Building A borders the property of Building U and shares a parking lot with Building U. The Applicant represents that, since purchasing Building A, the Fund has spent \$16,776.79 to maintain and improve Building A, including replacing wiring that did not comply with the applicable electrical regulations and comprised of exposed wires, replacing the heating and air conditioning system, and installing new security doors to secure Building A. The Fund has also paid \$13,938.76 in real estate taxes, \$4,027.93 in utilities, and \$10,483.00 in insurance costs with respect to Building A. The Applicant states that the total in holding costs and capital improvement costs (the Holding Costs) incurred by the Fund is \$45,226.48. Thus, the cost of the Fund's acquisition and holding of Building A has been \$110,226.48.

7. The Applicant represents that the Fund did not purchase Building A with the intent of eventually selling it to the Union. Nevertheless, the Applicant states that the sale of Building A to the Union (the Sale) will provide additional

liquidity to the Fund and will dispose of real property which is no longer needed by the Fund. Moreover, the Applicant states that the Union would use Building A and the land that it sits on as a site for a new Union Hall. The Applicant represents that the proposed price for which the Union will purchase Building A from the Fund is equal to the greater of: (A) \$110,226.48, representing the cost of acquisition and Holding Costs related to Building A that have been incurred by the Fund, or (B) the fair market value of Building A, as established by a qualified independent appraiser (the Appraiser), as of the date of Sale. As described in further detail below, an Appraiser selected by the qualified independent fiduciary (the Independent Fiduciary) without any assistance from a related party or a party to any current or planned future transactions with the Union, the Fund, or a related party will conduct the appraisal (the Appraisal) as of the date of Sale.

8. The Applicant states that, because the Union is a party in interest to the Fund under section 3(14)(D) of the Act, the Sale would constitute a prohibited transaction under section 406(a)(1)(A) and (D) of the Act. Furthermore, because certain officers of the Union are also Trustees of the Fund and they may have an interest in causing the Fund to engage in the

transaction with the Union, the Sale may also constitute a prohibited transaction under section 406(b)(1) and (2) of the Act. Therefore, the Applicant requests an exemption from sections 406(a)(1)(A) and (D) and 406(b)(1) and (2) of the Act for the Sale.

#### *The New Lease*

9. The Applicant represents that in 2012, the Union offered a new lease to the Fund for all of Building U, which would include a total of 9,600 square feet (the New Lease). The Applicant represents that the Union offered a below market rental rate of \$3 per square foot, or \$2,400 per month. In 2012, the Applicant engaged Tade Appraisal Company (Tade) to conduct an appraisal of Building U (the Tade Appraisal). Tade represents that it has not had any business engagements with the Union or any of its affiliates other than the Tade Appraisal. Furthermore, Tade represents that the fee paid in connection with the Tade Appraisal represented less than 1% of its annual income. Tade represents that its Appraiser, Scott Tade, is an Illinois-certified General Real Estate Appraiser in Illinois with 30 years of experience in the real estate field. In his career, Mr. Tade has worked on valuations of residential,

commercial and retail properties. The Tade Appraisal valued Building U at \$425,000, and included an analysis of rental rates for comparable properties. In this regard, Tade represents that, for comparable properties, rental rates were \$2.21 to \$5.14 per square foot for a triple net lease.

10. The Applicant represents that the New Lease is the best option for expanding the training program within the Fund's projected budgets. The Applicant represents that Building U is already constructed with a shop and classroom space. Moreover, the Fund can expand the shop space and install a computer lab in Building U over time with equipment purchases. The Applicant represents that the leasing of Building U will thus permit the Fund to expand the training program incrementally, without expending large sums of money to purchase and renovate another building.

11. Furthermore, the Applicant states that unless the Union can move its Union Hall to Building A, it will not be able to lease all of Building U to the Fund at the below market rent stated above. Therefore, according to the Applicant, the Fund would not be able to realize its best option to expand the training program.



12. The Applicant represents that the New Lease would comply with PTE 78-6. In this regard, the Applicant represents that the New Lease between the Fund and the Union for use as classroom space would be based on terms at least as favorable to the Fund as an arm's-length transaction with an unrelated party would be. Furthermore, the Applicant represents that the New Lease would be appropriate and helpful in carrying out the Fund's purposes, and the Fund will maintain or cause to be maintained for a period of 6 years from the termination of any such transaction such records as are necessary to demonstrate continued compliance with the conditions of PTE 78-6. Finally, as described below, the Independent Fiduciary negotiated and approved the terms of the New Lease.

#### *The Appraisal*

13. The Applicant represents that prior to the date of Sale, the Independent Fiduciary will engage an Appraiser who satisfies the Department's definition of "qualified independent appraiser" to perform an Appraisal of Building A on behalf of the Fund. The Applicant represents that the Appraiser will be selected by the Independent Fiduciary without any involvement of the Union or any other party to the covered transactions or any

party to any planned future transactions. The Appraisal will establish the value of Building A as of the date of Sale and will be a full, independent appraisal that complies in all respects with applicable appraisal standards.

*The Independent Fiduciary's Report*

14. The Applicant represents that the Trustees retained Rebecca Kling to serve both as the Independent Fiduciary and as legal counsel to the Fund. The Independent Fiduciary represents in her Statement of Independent Fiduciary that she was engaged by the Fund to represent its interests related to the Sale and the New Lease. The Independent Fiduciary represents that she is an experienced attorney with 28 years of experience specializing in commercial and residential real estate transactions, including acquisition, development and finance. The Independent Fiduciary represents that, prior to the Sale and the New Lease, she had no relationship with the Fund or the Union, and it is not anticipated that a relationship would continue following the consummation of the transactions. The Independent Fiduciary represents that she reviewed the terms of the Sale, and negotiated and approved the terms of the New Lease.

15. The Independent Fiduciary represents that Building A is vacant and serves no purpose in the successful operation or financial well-being of the Fund, except as dormant investment property. The Independent Fiduciary represents that the Sale for a price of \$110,226.48, which takes into account the Holding Costs incurred by the Fund since purchasing the Property is fair, reasonable and beneficial to the Fund, its participants and beneficiaries.<sup>13</sup> Furthermore, the Independent Fiduciary believes that, because the proposed agreement of Sale between the Fund and the Union contains minimal, limited representations and warranties on the part of the Fund, as seller; with the Sale being conducted primarily on an "as-is, where-is" basis; the Fund and its participants and beneficiaries are adequately protected from potential liability.

16. The Independent Fiduciary represents that the Sale furthers the interest of the Fund and its participants and beneficiaries because the Fund will have no use for Building A after entering into the New Lease and because the purchase price for Building A offered by the Union includes the Fund's Holding

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<sup>13</sup> In this regard, the Applicant has submitted two recent appraisals to the Department that set the price of Building A at approximately \$72,500.

Costs related to Building A. Furthermore, the Independent Fiduciary represents that Building U is the current site of the Fund's training programs and provides more space for expansion than Building A, and the New Lease reflects the Union's willingness to subsidize the Fund's rent at market to below-market pricing as indicated in the Tade Appraisal. Moreover, the Independent Fiduciary represents that, based on information contained in the June 30, 2012, audit report of the Fund, the Sale will not significantly change or adversely impact the Fund's asset allocation.

17. The Independent Fiduciary represents that she drafted the agreement for the New Lease to be entered into between the Fund as tenant and the Union as landlord. Based upon her review of the Tade Appraisal, she believes that the rent price of \$3 per square foot, as reflected in the New Lease terms, is at least as favorable to the Fund as would be negotiated and agreed to in good faith by any disinterested third party tenant in an arms-length transaction.

#### *Statutory Findings*

18. The Applicant represents that the requested exemption with respect to the Sale is administratively feasible because

the Sale is a one-time transaction of real property for cash between the Union and the Fund, which will be easy to implement if approved by the Department. The Applicant represents that the Sale is in the interest of the Fund and its participants and beneficiaries because it will permit the expansion of the training program at a below market rent. Furthermore, the Applicant represents that the Fund will receive greater than fair-market value in the Sale, accounting for Holding Costs. The Applicant states further that the Sale is protective of the Fund and its participants and beneficiaries because the Independent Fiduciary, an experienced real estate attorney, was engaged by the Fund to represent its interests related to the Sale. In this capacity, the Independent Fiduciary represents that she reviewed the terms of the Sale, including the purchase price, and negotiated and approved the terms of the New Lease.

#### *Summary*

19. In summary, the Applicant represents that the proposed exemption satisfies the statutory criteria for an exemption under section 408(a) of the Act for the reasons stated above and for the following reasons:

- a. The Sale is a one-time transaction for cash;

b. At the time of the Sale, the Fund receives the greater of either: (1) \$110,226.48; or (2) the fair market value of Building A, as established by the Appraiser, as of the date of Sale;

c. Before the date of Sale, the Appraiser will be retained by the Independent Fiduciary on behalf of the Fund without any involvement of the Union or any other party to the covered transactions or any planned future transactions;

d. The Independent Fiduciary, acting on behalf of the Fund, represents the Fund's interests for all purposes with respect to the Sale, and: (1) determines, among other things, that it is in the best interest of the Fund to proceed with the Sale; and (2) reviews and approves the purchase price and methodology used by the Appraiser in its Appraisal; and

e. The Fund pays no fees, commissions or other expenses associated with the Sale.

#### NOTICE TO INTERESTED PERSONS

Notice of the proposed exemption will be given to all Union members within 15 days of the publication of the notice of proposed exemption in the Federal Register, by first class U.S. mail to the last known address of all such individuals, and by

posting in the Union hall in a prominent location. Such notice will contain a copy of the notice of proposed exemption, as published in the Federal Register, and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the pending exemption. Written comments and hearing requests are due within 45 days of the publication of the notice of proposed exemption in the Federal Register. All comments will be made available to the public.

**Warning:** Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Scott Ness of the Department, telephone (202) 693-8561. (This is not a toll-free number.)

EXCO Resources, Inc. 401(k) Plan (the Plan)

Located in Dallas, TX

[Application No. D-11821]

#### PROPOSED EXEMPTION

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).

#### Section I: Transactions

If the proposed exemption is granted, effective for the period beginning December 17, 2013, and ending January 9, 2014, the restrictions of sections 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(E) of the Code,<sup>14</sup> shall not apply:

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<sup>14</sup> For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.



(a) To the acquisition of certain transferable subscription right(s) (the Right or Rights) by the individually-directed account(s) (the Account or Accounts) of certain participant(s) (the Invested Participant(s)) in the Plan, in connection with an offering (the Offering) of shares of the common stock (the Common Stock) of EXCO Resources, Inc. (EXCO) by EXCO, the plan sponsor (the Plan Sponsor) and a party in interest with respect to the Plan; and

(b) To the holding of the Rights received by the Accounts during the subscription period of the Offering; provided that the conditions set forth in Section II of this proposed exemption were satisfied for the duration of the acquisition and holding of such Rights.

## Section II: Conditions

(a) The acquisition of the Rights by the Accounts of Invested Participants occurred in connection with the Offering, and the Rights were made available by EXCO on the same material terms to all shareholders of the Common Stock of EXCO, including the Accounts of Invested Participants;

(b) The acquisition of the Rights by the Accounts of Invested Participants resulted from an independent corporate act of EXCO;

(c) Each shareholder of the Common Stock of EXCO, including each of the Accounts of Invested Participants, received the same proportionate number of Rights, and this proportionate number of Rights was based on the number of shares of Common Stock held by each such shareholder, as of 5:00 P.M. New York City time, on December 19, 2013 (the Record Date);

(d) The Rights were acquired pursuant to, and in accordance with, provisions under the Plan for individually-directed investment of the Accounts by the Invested Participants, all of whose Accounts in the Plan held the Common Stock;

(e) The decision with regard to the holding and disposition of the Rights by an Account was made by the Invested Participant whose Account received the Rights;

(f) If any of the Invested Participants failed to give instructions as to the exercise of the Rights received in the Offering, or gave instructions to the Plan trustee (the Trustee) to sell such Rights, such Rights were automatically sold in blind transactions on the New York Stock Exchange (NYSE), and

the proceeds from such sales were distributed pro-rata to the Accounts of such Invested Participants whose Rights were sold;

(g) No brokerage fees, no commissions, no subscription fees, and no other charges were paid by the Plan or by the Accounts of Invested Participants with respect to the acquisition and holding of the Rights, and no commissions, no fees, and no expenses were paid by the Plan or by the Accounts of Invested Participants to any related broker in connection with the sale or exercise of any of the Rights, or with regard to the acquisition of the Common Stock through the exercise of such Rights;

(h) EXCO did not influence any Invested Participant's election with respect to the Rights; and

(i) The terms of the Offering were described to the Invested Participants in clearly written communications, including, but not limited to, the prospectus for the Rights Offering.

EFFECTIVE DATE: This proposed exemption, if granted, will be effective for the period beginning on December 17, 2013, the commencement date of the Offering, and ending on January 9, 2014, the expiration date of the Offering.

## SUMMARY OF FACTS AND REPRESENTATIONS

### Background

1. The Plan, which was adopted, effective as of January 1, 1999, is a defined contribution, 401(k) retirement saving plan that provides for a cash and deferred arrangement. The Plan is a participant directed account plan designed to comply with the requirements of 404(c) of the Act. As of December 31, 2013, there were 863 participants in the Plan. Also, as of December 31, 2013, the Plan had total net assets of \$100,335,599.

Prudential Retirement Insurance and Annuity Company is the third-party administrator and record-keeper for the Plan. Prudential Bank and Trust Company is the Trustee. The Plan is administered by a committee (the Committee), composed of certain appointed employees of EXCO. The Committee has the responsibility of selecting the investment options into which Plan participants can direct their contributions.

2. EXCO (the Applicant) is the Plan Sponsor. A Texas

corporation incorporated in October 1955, EXCO is an independent oil and natural gas company engaged in the exploitation, exploration, acquisition, and development of onshore oil and natural gas properties, with a focus on shale resource plays. EXCO's principal operations are conducted in certain key U.S. oil and natural gas areas, including Texas, Louisiana, and the Appalachia region. EXCO's principal office is located in Dallas, Texas. According to EXCO's Annual Report on Form 10-K for the year ended December 31, 2013, on a consolidated basis, EXCO and its consolidated subsidiaries had total assets of \$2,408,628,000, total liabilities of \$2,260,723,000, and total shareholders' equity of \$147,905,000.

3. Among the investment options offered to Plan participants are various types of securities, including shares of EXCO Common Stock. Investment by Plan participants in the Common Stock is entirely voluntary. The Accounts in the Plan acquire the Common Stock only as a result of participant-directed investment decisions. The Invested Participants whose Accounts in the Plan are invested in the Common Stock are employees, former employees, or beneficiaries of employees of EXCO. As of the Record Date (December 19,

2013), the Accounts of Invested Participants held 704,396 shares of the Common Stock.

4. The Common Stock is publicly-traded on the NYSE under the symbol "XCO." The Common Stock has a par value \$0.001 per share. The Common Stock held by the Accounts of Invested Participants is the same type and class of shares as those held by other the Common Stock shareholders of EXCO. The Common Stock is a "qualifying employer security," as defined under section 407(d)(5) of the Act.

#### **EXCO's Considerations**

5. In connection with its regular review of EXCO's liquidity and financial condition, the Board of Directors of EXCO (the Board) considered various alternatives in both debt and equity markets in order to strengthen EXCO's liquidity and financial ability following several significant acquisitions and dispositions during 2013. The alternatives considered by the Board included a rights offering and an underwritten public offering of additional shares of Common Stock. After assessing these alternatives, a decision was made to conduct the Offering.

In this regard, on November 22, 2013, the directors on the Board (the Disinterested Directors) who are not affiliated with

certain investors (the Investors)<sup>15</sup> in the Common Stock by unanimous vote approved: (a) the basic terms of the Offering; and (b) the subscription price of \$5.00 per share of the Common Stock. Furthermore, on the same date, the Investors agreed to the basic terms of their commitments under agreements (the Agreements) to purchase certain amount of shares of Common Stock in the Offering, and the Disinterested Directors approved these commitments with the Investors.

#### **The Offering**

6. The Offering commenced on December 17, 2013.<sup>16</sup> The Offering permitted shareholders of record, as of the Record Date, who received the Rights, to purchase up to an aggregate of 44,995,665 shares of Common Stock at a price of \$5.00 per share,

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<sup>15</sup> The Investors referred to above are WL Ross & Co. LLC and its affiliates and Hamblin Watsa Investment Counsel Ltd. and its affiliates.

<sup>16</sup> The Applicant notes that the Record Date occurred on December 19, 2013. It is represented that there was no material impact to the Accounts of Invested Participants as a result of the Record Date being set two (2) days after the commencement of the Offering. In this regard, the number of Rights that each shareholder, including the Accounts, was entitled to receive was based on the number of shares each shareholder owned, as of the Record Date, and was not fully determined until the Record Date.

for an aggregate Offering price of \$224,978,325. All shareholders also had the right to acquire additional Rights by purchasing additional shares of Common Stock on the open market (or through their Plan Accounts) prior to the Record Date. Further, all shareholders holding the Rights were entitled to an over-subscription privilege. However, the ability of any shareholder, including the Accounts, to exercise their over-subscription privilege was limited by the number of shares such shareholder owned as of the Record Date. Thus, all shareholders had the ability to increase or decrease their shares of Common Stock from the commencement of the Offering through the Record Date. The Offering expired on January 9, 2014.

7. With respect to the trading prices of the Common Stock during the Offering period, it is represented that at the close of business on December 16, 2013, the Common Stock was trading on the NYSE at \$5.01 per share, and on December 17, 2013, the commencement date of the Offering, the Common Stock was trading on the NYSE at \$4.83 per share. On the Record Date, the Common Stock was trading on the NYSE at \$4.99 per share. On December 24, 2013, the Common Stock traded at \$5.41 per share. The closing price of the Common Stock on the expiration date of



the Offering (January 9, 2014), was \$4.99 per share. Thus, during the subscription period of the Offering, the closing price of the Common Stock fluctuated between \$4.83 and \$5.41 per share.

Accordingly, exemptive relief has been requested from December 17, 2013, the commencement date of the Offering, to January 9, 2014, the expiration date of the Offering.

### **The Rights**

8. The Invested Participants were notified of the issuance of the Rights in a news release and in a posting on the EXCO's website during the month of December 2013. In addition, each Invested Participant was provided detailed written information regarding the Rights Offering, which included: (a) a prospectus describing the Offering, (b) frequently asked questions and answers regarding the Offering, (c) an election form, (d) a return envelope addressed to Continental Stock Transfer & Trust Company (Continental), the subscription agent, and (e) a subscription form.

The Rights entitled the holders thereof to basic subscription rights as well as to an over-subscription privilege. Under the basic subscription rights, each holder of

a Right was entitled to purchase, through the exercise of such Right, 0.25 of one (1) share of Common Stock for each whole share of Common Stock held by the shareholder, at a subscription price of \$5.00 per share of Common Stock. Under the over-subscription privilege, each holder was entitled to subscribe for additional shares of Common Stock, subject to certain limitations and allocation procedures, up to the number of shares of Common Stock that were not subscribed for by the other holders of the Rights, pursuant to their basic subscription rights.

It is represented that there were valid exercises to purchase an aggregate of 28,248,049 shares of Common Stock, pursuant to directions from holders of the Rights. The exercise of the Rights resulted in gross proceeds for EXCO of approximately \$141.2 million. Together with the shares of Common Stock issued to the Investors pursuant to the Agreements, the Offering resulted in EXCO receiving gross proceeds of approximately \$272.9 million.

### **Shareholder Elections**

9. The election form provided an Invested Participant with three (3) choices with respect to the Rights. In this regard,

the Invested Participant could direct Continental: (a) to not exercise the Rights, with the express understanding that the Trustee would attempt to sell the Rights on the NYSE; (b) to neither exercise the Rights nor attempt to sell the Rights, with the understanding that the Rights would expire at the end of the Offering; or (c) to exercise the number of Rights elected by the Invested Participant, with the express understanding that if the Invested Participant did not elect to exercise all of the Rights, the Trustee would attempt to sell the remaining Rights on the NYSE. Each Right was transferable and was traded on the NYSE under the symbol "XCO-RT" from December 23, 2013 until 4:00 P.M. New York City time on January 8, 2014.

As noted in the prospectus and on the election form, in order for the Invested Participant to exercise the Rights, there must have been sufficient funds in the Guaranteed Income Fund under the Invested Participant's Account to cover the total subscription payment. If the value of the investments in the Guaranteed Income Fund did not equal or exceed the total subscription payment required, the Rights held by the Invested Participant's Account were exercised for shares of Common Stock to the fullest extent possible based on the liquidated value of

the Account invested in the Guaranteed Income Fund, to the nearest whole share.

Following receipt of the election form by Continental, the Trustee and Continental confirmed and reconciled the identity of the Invested Participants who had made an election to sell their Rights, to exercise their Rights, or to allow all of their Rights to expire. The Trustee placed the order with Continental to purchase the Common Stock on behalf of the Accounts of the Invested Participants who elected to sell or to exercise the Rights, and liquidated the appropriate investments held in the Guaranteed Income Fund of such Accounts to purchase the Common Stock. Following the closing of the Offering, the shares of Common Stock purchased and the proceeds of the sale of the Rights were then credited to the Accounts of the Invested Participants.

10. As of the Record Date, 307 Accounts of Invested Participants held 704,396 shares of Common Stock. As of the Record Date, the total fair market value of the Common Stock held by the Plan in all Accounts was \$3,519,025, and the approximate percentage of the fair market value of the total assets of the Plan invested in the Common Stock was 3.49%. Also, as of the Record Date, the shares of Common Stock held in

the Accounts of Invested Participants constituted approximately 0.3 percent (0.3%) of the shares of Common Stock outstanding.

11. As a result of the Common Stock held by the Accounts of Invested Participants on the Record Date, the Plan acquired 704,396 Rights to acquire up to 176,099 shares of Common Stock during the Offering. Of the Rights acquired by the Plan on behalf of the Accounts, all such Rights were either exercised or sold, except for the Rights held by two (2) Accounts of Invested Participants who elected to allow a total of 25,961 combined Rights to expire. Of the 9,954 Rights acquired by the Accounts of three (3) Invested Participants as a result of the Offering, it is represented that 9,952 Rights held by these Accounts were exercised<sup>17</sup> for a total of 2,488 shares of Common Stock, which shares were eligible for trading on the NYSE by the Accounts.

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<sup>17</sup>It is represented that the Accounts relied on the relief provided by the statutory exemption, pursuant to section 408(e) of the Act for the exercise of the Rights. Accordingly, the Department is not providing any relief herein from such prohibited transaction provisions with respect to the exercise of the Rights. In addition, the Department is offering no view on whether the requirements of the statutory exemption provided in section 408(e) of the Act and the Department's regulations, pursuant to 29 CFR §2550.408(e) were satisfied or whether the statutory exemption is applicable to the exercise of the Rights.

The exercise of the Rights held in the Accounts of the Invested Participants was subject to the requirement that on the date of the exercise of the Rights, the prevailing market price on the NYSE for a share of Common Stock (the Prevailing Price), was required to equal or exceed the per share subscription price of the Rights. Accordingly, the Invested Participants could instruct the Trustee to exercise the Rights and acquire shares only if the Prevailing Price of a share of Common Stock equaled or exceeded \$5.00 per share.

Notwithstanding the fact that the price per share of Common Stock on the expiration date of the Offering was \$4.99 per share, it is represented that the Prevailing Price of a share of Common Stock exceeded the subscription price of \$5.00 per share at the time the three (3) Invested Participants exercised the Rights on behalf of their Accounts. In this regard, the Rights held by these Accounts were all exercised on January 7, 2014, at an exercise price of \$5.07 per share. The three (3) Invested Participants, respectively, exercised the following number of Rights, 7,944, 1,044, and 964.

It is also represented that the three (3) Invested Participants had an over-subscription privilege. One of these

Invested Participants exercised her over-subscription privilege and acquired an additional 482 shares of Common Stock.

The Trustee was also able to sell the Rights on the NYSE. In this regard, the Trustee, on behalf of the Accounts of 302 Invested Participants, sold approximately 668,481 Rights held in such Accounts for total sales proceeds of \$8,235.25. The sale proceeds were allocated pro-rata to the Accounts of the Invested Participants whose Rights were sold.

12. No brokerage fees, no commissions, no subscription fees, and no other charges were paid by the Plan or by any of the Accounts of Invested Participants with respect to the acquisition and holding of the Rights, and no commissions, no fees, and no expenses were paid by the Plan or by any of the Accounts of Invested Participants to any related broker in connection with the sale or the exercise of any of the Rights, or with regard to the acquisition of the Common Stock through the exercise of such Rights.

#### **Requested Relief**

13. EXCO has requested an exemption for: (a) the acquisition of the Rights by the Accounts of Invested Participants in connection with the Offering of the Common Stock

by EXCO; and (b) the holding of the Rights by the Accounts of Invested Participants during the subscription period of the Offering. EXCO initially requested relief for the sale of the Rights by the Trustee, but subsequently withdrew its request for such relief, as the sale of the Rights occurred in blind transactions on the NYSE.

Section 406(a)(1)(E) of the Act prohibits the acquisition on behalf of the plan of any "employer security" in violation of section 407(a). Section 406(a)(2) of the Act prohibits a fiduciary who has authority or discretion to control or manage the assets of the plan to permit such plan to hold any "employer security" if he knows or should know that the holding of such security violates section 407(a) of the Act. Section 407(a) of the Act prohibits a plan from acquiring or holding employer securities that are not "qualifying employer securities."

It is represented that the Rights acquired by the Accounts of Invested Participants satisfy the definition of "employer securities," pursuant to section 407(d)(1) of the Act. However, as the Rights were not stock or marketable obligations, such Rights do not meet the definition of "qualifying employer securities," as set forth in section 407(d)(5) of the Act. Accordingly, the subject transactions constitute an acquisition



and holding on behalf of the Accounts of Invested Participants, of employer securities which are not qualifying employer securities, in violation of sections 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A) of the Act.

EXCO has also requested relief from the prohibitions of section 406(b)(1) and 406(b)(2) of the Act. Section 406(b)(1) of the Act prohibits a fiduciary from dealing with the assets of a plan in his own interest or for his own account. Section 406(b)(2) of the Act prohibits a fiduciary from engaging in his individual or any other capacity to act in any transaction involving the plan on behalf of a party (or represent a party) whose interest are adverse to the interest of the plan or the interests of its participants or beneficiaries.

As the employer any of whose employees are covered by the Plan, EXCO is a party in interest with respect to the Plan, pursuant to section 3(14)(C) of the Act. Accordingly, the acquisition and holding by the Accounts of Invested Participants of the Rights issued by EXCO, a party in interest with respect to the Plan, would involve self-dealing and conflicts of interest for which relief is needed.

14. It is represented that the subject transactions have already been consummated. In this regard, the Applicant represents that there was insufficient time between the dates when the Accounts of Invested Participants acquired the Rights and when such Rights were exercised, sold, or expired, to apply for and be granted an exemption. EXCO therefore is seeking a retroactive exemption to be granted, effective from December 17, 2013, the commencement date of the Rights Offering, to January 9, 2014, the expiration date of the Offering.

15. EXCO represents that the proposed exemption is administratively feasible. In this regard, the acquisition and holding of the Rights by the Accounts of Invested Participants was a one-time transaction that involved an automatic distribution of the Rights to all shareholders that resulted from an independent corporate act of EXCO. It is represented that corporations often make a rights offering available to all shareholders.

16. EXCO represents that the transactions which are the subject of this proposed exemption are in the interest of the Accounts of Invested Participants, because the subject transactions represented a valuable opportunity to such Accounts to buy the Common Stock at a potential discount or to sell the

Rights and receive the proceeds from such sale. The Rights Offering also provided all of EXCO's shareholders, including the Accounts of Invested Participants, with the opportunity to participate in the subject transactions on a pro-rata basis.

### **Safeguards of Exemption**

17. EXCO represents that the proposed exemption provides sufficient safeguards for the protection of the Accounts of Invested Participants and the beneficiaries of such Accounts. In this regard, the Applicant states that participation in the Offering protected the Accounts of the Invested Participants from having their interests in EXCO diluted as a result of the Offering. Further, under the terms of the Offering, all shareholders, including the Accounts of Invested Participants acquired and held the Rights automatically, at no charge.

In addition, the Applicant explains that EXCO made the Rights available on the same terms to all shareholders of the Common Stock, including the Accounts. In this regard, each shareholder of EXCO, including each of the Accounts, received the same proportionate number of Rights, and this proportionate number of Rights was based on the number of shares of Common Stock held by such shareholder, as of the Record Date. Under

the terms of the Offering, one (1) Right was issued for each whole share of the Common Stock held by each shareholder on the Record Date. Each of the Rights entitled the shareholders, including the Accounts, to purchase, through the exercise of such Rights, the Common Stock issued by EXCO in connection with the Offering.

Further, the Applicant states that the Accounts of Invested Participants were protected against economic loss by exercising the Rights or by selling the Rights. If the Invested Participants affirmatively elected to sell the Rights or did not make an election with respect to the Rights, then the Trustee automatically sold the rights on the NYSE. If the Invested Participants elected to exercise their Rights, such Rights were exercised in accordance with their instructions, provided that the Prevailing Price on the date of the exercise equaled or exceeded the subscription price per share, thereby further protecting the Invested Participants.

### **Summary**

18. In summary, EXCO represents that the subject transactions satisfy the statutory criteria of section 408(a) of the Act because:

(a) The acquisition of the Rights by the Accounts of Invested Participants occurred in connection with the Offering, and the Rights were made available by EXCO to all shareholders of EXCO, including the Accounts of Invested Participants;

(b) The acquisition of the Rights by the Accounts of Invested Participants resulted from an independent corporate act of EXCO;

(c) Each shareholder of the Common Stock of EXCO, including each of the Accounts of Invested Participants, received the same proportionate number of Rights, and this proportionate number of Rights was based on the number of shares of EXCO Common Stock held by each such shareholder, as of the Record Date;

(d) The Rights were acquired pursuant to, and in accordance with, provisions under the Plan for individually-directed investment of the Accounts by the Invested Participants all of whose Accounts in the Plan held the Common Stock;

(e) The decision with regard to the holding and disposition of the Rights by an Account was made by the Invested Participant whose Account received the Rights;

(f) If any of the Invested Participants failed to give instructions as to the exercise of the Rights received in the Offering, or gave instructions to the Trustee to sell such

Rights, such Rights were automatically sold in blind transactions on the NYSE, and the proceeds from such sales were distributed pro-rata to the Accounts of such Invested Participants whose Rights were sold;

(g) No brokerage fees, no commissions, no subscription fees, and no other charges were paid by the Plan or by the Accounts with respect to the acquisition and holding of the Rights, and no commissions, no fees, and no expenses were paid by the Plan or by the Accounts of Invested Participants to any related broker in connection with the sale or exercise of any of the Rights, or with regard to the acquisition of Common Stock through the exercise of such Rights;

(h) EXCO did not influence any Invested Participant's election with respect to the Rights; and

(i) The terms of the Offering were described to the Invested Participants in clearly written communications, including, but not limited to, the prospectus for the Rights Offering.

NOTICE TO INTERESTED PERSONS

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The persons who may be interested in the publication in the FEDERAL REGISTER of the Notice of Proposed Exemption (the Notice) include all of the Invested Participants whose Accounts were invested in shares of Common Stock on the Record Date and received the Rights pursuant to the Offering.

It is represented that all such interested persons will be notified of the publication of the Notice by first class mail, to each such interested person's last known address within fifteen (15) days of publication of the Notice in the FEDERAL REGISTER. Such mailing will contain a copy of the Notice, as it appears in the FEDERAL REGISTER on the date of publication, plus a copy of the Supplemental Statement, as required, pursuant to 29 C.F.R. §2570.43(a)(2), which will advise all interested persons of their right to comment and to request a hearing. All written comments and/or requests for a hearing must be received by the Department from interested persons within forty-five (45) days of the publication of this proposed exemption in the FEDERAL REGISTER.

All comments will be made available to the public.

**Warning:** Do not include any personally identifiable information (such as name, social security number, address, or other contact information) or confidential business information that you do

not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc of the Department, telephone (202) 693-8540. (This is not a toll-free number.)



## **GENERAL INFORMATION**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and

beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 23rd day of December, 2014.

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Lyssa E. Hall, Director,  
Office of Exemption  
Determinations,  
Employee Benefits Security  
Administration,  
U.S. Department of Labor.

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